

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.1608 OF 2017

Shekhar G. Pathare ... Petitioner
Vs.
Government of Maharashtra thru G.P. & others ... Respondents

Mr. Shekhar Pathare, Petitioner in person.
Mr. J. A. Madane, AGP for Respondent No.1-State.
Mr. S. K. Shinde a/w. Ms Anupama Gawde for Respondent No.20.

CORAM : R. G. KETKAR, J.
DATE : MARCH 02, 2017

P.C. :

Heard Mr. Pathare, petitioner in person, Mr. Madane, learned AGP for respondent No.1-State and Mr. Shinde, learned Counsel for respondent No.20 at length. Mr. Pathare states that he has served rest of the respondents. However, none appears on their behalf. Rule. Learned Counsel for respective respondents waive service. Having regard to the narrow controversy raised in this Petition as also at the request and by consent of the parties, Rule is made returnable forthwith and the Petition is taken up for final hearing.

2. By this Petition under Article 227 of the Constitution of India, petitioner, hereinafter referred to as 'disputant', has challenged the judgment and orders dated 19.10.2016 below exhibits-95 and 96 passed by the learned Judge, IIIrd Co-operative Court, Mumbai in Dispute No.31 of 2010. By order dated 19.10.2016 below exhibit-95, the learned trial Judge rejected the application filed by the disputant for initiating action against all sitting directors and manager of respondent No.20 (for short 'society') under Section 148-A(1)(a) of the Maharashtra Co-operative Societies Act, 1960 (for short 'Act') for committing

contempt of order dated 09.10.2015 passed by the learned trial Judge below exhibit-88. By order dated 19.10.2016 below exhibit-96, the learned trial Judge rejected the application made by the disputant for filing the criminal contempt against all miscreants before the Judicial Magistrate First Class having jurisdiction to entertain and decide the criminal contempt.

3. In support of this Petition, Mr. Pathare submitted that disputant had filed application exhibit-88 inter alia praying for direction to the opponents to produce true copies of documents at Sr. No.1 to 4 of exhibit-A to the application among other prayers. By order dated 09.10.2015, the learned trial Judge allowed the application and directed the Society to give inspection of record to the disputant within 10 days from the service of the order as per provisions of Section 32 of the Act. The learned trial Judge also issued further directions to the Society to intimate the time schedule and date of giving inspection to the Court and give inspection of the record to the disputant as per Section 32 of the Act. He submitted that basically, disputant had prayed for production of documents at Sr. No.1 to 4 of exhibit-A. In paragraph 7 of order dated 09.10.2015, the learned trial Judge has discussed the merits of the application. The learned trial Judge has observed that disputant has sought information from the opponents. He submitted that the learned trial Judge rejected the application exhibit-95 principally on the ground that by order dated 09.10.2015, society was directed to give **inspection**. He invited my attention to Section 148-A(1)(a) of the Act to contend that opponents have committed contempt by not giving information as sought by the disputant and therefore, it is a fit case for initiating action under Section 148-A(1)(a) of the Act for breach of order dated 09.10.2015.

4. Mr. Pathare submitted that the learned trial Judge also did not hold enquiry as contemplated by the High Court Rules. Repeatedly, time was taken by the respondents for filing reply and ultimately, no reply was filed. Order dated 09.10.2015 was not challenged by the respondents and thus attained finality. It is not choice of the contemnor as to how he has to follow the direction contained in the order and it is for the Court to ensure compliance of its order. He submitted that the learned trial Judge, while rejecting the application, has made a passing reference to paragraph 4 of the order dated 22.08.2016 passed by this Court (Coram: N. M. Jamdar, J.) in Writ Petition No.6484 of 2016. He, therefore, submitted that this is a fit case for allowing application exhibit-95 and taking action under Section 148-A(1)(a) of the Act.

5. As far as application exhibit-96 is concerned, Mr. Pathare submitted that the learned trial Judge though has reproduced the contentions raised in application exhibit-96 in paragraphs 5, 7 and 8 of the impugned order, the said contentions were not dealt with at all. In fact, the order below exhibit-96 was mostly devoted in dealing with non-compliance of order dated 09.10.2015. which was the subject matter of application exhibit-95. He, therefore, submitted that the learned trial Judge was not justified in rejecting the application exhibit-96.

6. On the other hand, Mr. Shinde supported the impugned order. He submitted that the learned trial Judge held that respondents were directed to give inspection of the documents. The learned trial Judge has referred to the provisions of Order XI, Rule 21 of the Code of Civil Procedure, 1908 (for short 'C.P.C.') as also consequences upon failure of the party in complying the directions of the Court. He submitted that in case the respondents have failed to comply the directions contained in order dated 09.10.2015, the consequences provided under Order XI,

Rule 21 of C.P.C. will follow. In any case, he submitted that the expression “inspection” is not covered by Section 148-A(1)(a) of the Act. He submitted that proceedings in contempt can result in penal consequences and are quasi criminal nature. The Court has to interpret and construe the provision strictly. As far as order below exhibit-96 is concerned, Mr. Shinde relied upon Section 148-A of the Act.

7. I have considered the rival submissions advanced by the learned Counsel appearing for the parties. I have also perused the material on record. As noted earlier, disputant has filed application exhibit-95 for initiating action against the respondents for non-compliance of order dated 09.10.2015. Perusal of paragraph 7 of that order shows that the learned trial Judge, after considering the merits of the case, directed Society to give inspection of the record. Clauses 1 and 2 of the operative part of the order dated 09.10.2015 read thus,

“1) The opponent no.18 society is directed to give inspection of record to the disputant within 10 days from service of order as per provisions of section 32 of the M.C.S.Act 1960.

2) The opponent society and disputant shall intimate the time schedule & date of giving inspection to this court and gave inspection of record to the disputant as per provisions of section 32 of the M.C.S. Act 1960.”

8. Thus, the learned trial Judge directed to give inspection of record. Order XI, Rule 21 reads thus,

“21. Non-compliance with order for discovery.- (1) Where any party fails to comply with any order to answer interrogatories, or for discovery or inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want of prosecution, and, if a defendant, to have his defence, if any, struck out, and to be placed in the same position as if he had not defended, and the party interrogating or seeking discovery or inspection may apply to the Court for an order to that effect, and an order may be made on such application accordingly, after notice to the parties and after giving them a reasonable opportunity of being heard.

(2) ... ”

9. Perusal of the above extracted provision shows that if any party fails to comply any order for inspection of documents, he shall, if a plaintiff, be liable to have his suit dismissed for want or prosecution, and, if a defendant, to have his defence, if any struck out, and to be placed in the same position as if had not defended the Suit. In the case of ***Ramavatar Surajmal Modi vs Mulchand Surajmal Modi*** , 2004 (2) **Mh.L.J. 1** , the Division Bench of this Court dealt with the provisions of Order XXXIX, Rule 11 as added by Bombay High Court. The Division Bench dealt with the decision of the Apex Court in *M/s. Babbar Sewing Machine Co. vs Tirlok Nath Mahajan*, **AIR 1978 SC 1436**. In paragraphs 14, 16 and 24, the Apex Court has observed thus,

"14. Even assuming that in certain circumstances the provisions of Order XI, Rule 21 must be strictly enforced, it does not follow that a suit can be lightly thrown out or a defence struck out, without adequate reasons. The test laid down is whether the default is wilful. In the case of a plaintiff, it entails in the dismissal of the suit and, therefore, an order for dismissal ought not be made under Order XI, Rule 21, unless the Court is satisfied that the plaintiff was wilfully withholding information refusing to, answer interrogatories or by withholding the documents which he ought to discover. In such an event, the plaintiff must take the consequence of having his claim dismissed due to his default, i.e. by suppression of information which he was bound to give : *Denvillier v. Myedrs*, (1883) WN 58. In the case of the defendant, he is visited with the penalty that his defence is liable to be struck out and to be placed in the same position as if he had not defended the suit. The power for dismissal of a suit or striking out of the defence under Order XI, Rule 21, should be exercised only where the defaulting party fails to attend the hearing or is guilty of prolonged or inordinate and inexcusable delay which may cause substantial or serious prejudice to the opposite party.

16. An order striking out the defence under Order XI, Rule 21 of the Code should, therefore, not be made unless there has been obstinacy or contumacy on the part of the defendant or wilful attempt to disregard the order of the Court. The rule must be worked with caution, and may be made use of as a last resort: *Mulla's Civil Procedure Code* 13th Ed., Vol. 1, p. 581, *Khajah Assenoolla Joo v. Khajah Abdool Aziz*, (1883) ILR 9 Cal 923; *Banshi Singh v. Palit Singh*, (1908) 7 Cal LJ 295; *Allahabad Bank Ltd. v. Ganpat Rai*, ILR 11 Lah 209:(AIR 1929 Lah 750); *Haigh v. Haigh*, (1885) 31 Ch.D. 478 & *Twycroft v. Grant*, (1975) WN 201.

24. The principle governing the Court's exercise of its discretion under Order XI, Rule 21, as already stated, is that it is only when the default is wilful and as a last resort that the Court should dismiss the suit or strike out the defence, when the party is guilty of such contumacious conduct or there is a wilful attempt to disregard the order of the Court that the trial of the suit is arrested. Applying this test, it is quite clear that there was no wilful default on the part of the Defendant of the Court's order under Order XI, Rule 18(2) for the production of documents for inspection, and consequently, the order passed by the trial Court on 23rd May, 1967, striking out the defence of the defendant must be vacated, and the trial must proceed afresh from the stage where the defendant was not permitted to participate. ”

10. The Division Bench held that the consequence of dismissal of suit or striking out the defence in Order XI, Rule 21 is visited as the case may be where the party fails to comply with the order for inspection of documents. It was further held that the provisions of Order XI, Rule 21 are held to be directory by the Apex Court in **M/s. Babbar Sewing Machine Co.** (*supra*).

11. While rejecting the application below exhibit-95, the learned trial Judge has referred to Rule 83 of the Maharashtra Co-operative Societies Rules, 1961 (for short 'Rules'), which lays down the procedure for execution of order or award passed by the Co-operative Court. The learned trial Judge has also referred to the order dated 22.08.2016 passed by this Court in Writ Petition No.6484 of 2016, and in particular paragraph 4 thereof. In paragraph 4, the learned Single Judge has observed that if the society does not give inspection of the documents, it will be at the risk of the society and in case, in future, they are found to be relevant, the Court may draw an adverse inference.

12. In view thereof as also for the reasons recorded by the learned trial Judge in the impugned order, no case is made out for interfering with the order passed below exhibit-95. In so far as order below exhibit-

96 is concerned, the learned trial Judge has reproduced the case in paragraphs 5, 7 and 8 of application exhibit-96. However, perusal of that order does not indicate that the learned trial Judge has dealt with the contentions referred in paragraphs 5, 7 and 8. Mr. Shinde was also not in a position to indicate that the contentions referred in paragraphs 5, 7 and 8 were dealt with the learned trial Judge.

13. In the light of the aforesaid discussion, in so far as the order below exhibit-95 is concerned, no case is made out. Mr. Pathare undoubtedly submitted that the learned trial Judge was obliged to follow rules framed by the High Court and ought to have conducted the enquiry. I, however, find that the enquiry would be necessary if the learned trial Judge was of the opinion that the society and its office bearers are guilty of contempt for committing breach of order dated 09.10.2015. For the reasons already recorded, I do not find that they can be said to be guilty for committing breach of the order dated 09.10.2015. In the result, Petition partly succeeds. Hence, the following order:

- a. Order dated 19.10.2016 below exhibit-96 is set aside and application exhibit-96 is restored to the file of the learned trial Judge. The same shall be decided in accordance with law;
- b. All contentions of the parties on merits are expressly kept open;
- c. As far as order dated 19.10.2016 below exhibit-95 is concerned, that is upheld;
- d. Rule is partly made absolute with no order as to costs;
- e. Order accordingly.

(R. G. KETKAR, J.)